MOHD. MOCTA SHARIFF

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CRIMINAL APPEAL NO. 9 OF 1983]
15 SEPTEMBER 1983

CRIMINAL LAW: *Dangerous Drugs - Possession of 0.14 grammes of heroin and 0.01 grammes of morphine - Accused, a Police Officer - Whether on duty at material time and whether possession of drugs lawful - Discrepancies in cautioned statement and police report - Appeal against conviction and sentence.*

On 1 March 1982 the accused, a member of the Police Field Force, stationed at Simpang Rengam, was arrested at Kampong Datuk Dalam, for being in possession of 0.14 grammes of heroin and 0.01 grammes of morphine. The following day he made a cautioned statement. After he was released from remand he made a police report. Later he was tried and found guilty of the offence under s. 12(2) of the Dangerous Drugs Act 1952 and was sentenced to imprisonment for 10 months.

The appellant appealed against conviction and sentence. The arguments were that, on the day in question after coming to Johore Bahru, he received information that a suspect had drugs in his possession. He apprehended the suspect and found the drugs on him and he took possession thereof. But before he could do anything the suspect escaped and could not be apprehended. Meanwhile a Police party arrived at the scene and arrested the appellant although he identified himself as a Police man. The appellant claimed that at the time of arrest, the drugs which he had retrieved earlier were on the ground. He further contended that his version of what actually happened was corroborated by the cautioned statement and Police report. He claimed that since he was a Police Officer, he considered himself to be on duty 24 hours a day and that he was entitled to apprehend the suspect and therefore had every lawful authority for being in possession of the drugs at the time of his arrest. He claimed that the he was made a victim of a frameup by the Police party. It was submitted that the appellant was only an addict and therefore a prison sentence should not have been imposed upon him.

Held:

[1] The appellant had left Simpang Rengam without the permission of his superiors. His presence in Johore Bahru was unauthorised and therefore he cannot be the said to have been on duty at that time. He failed to discharge the onus upon him to show that he was on duty at the material time.

[2] The claim that the appellant was a drug addict, which was not made in the Court below, had not been substantiated in the remotest degree.

[3] The sentence imposed by the learned Magistrate was inadequate and therefore increased the same to 15 months' imprisonment.

[Appeal dismissed. Sentence increased to 15 months.]

Cases referred to:
Wong Chooi v. PP [1967] 2 MLJ 180
PP v. Saiman [1971] 2 MLJ 17
Leow Nghee Lim v. Reg. [1956] 22 MLJ 28
PP. v. Tan Hock Sing [1963] MLJ 219

Legislation referred to:
Criminal Procedure Code (FMS Cap 6), s. 23
Dangerous Drugs Act 1952, ss. 12(2), (3)
Police Act 1967, s. 19

For the appellant - Teh Poh Teik (Nordin Hussin with him)
For the respondent - A. Rahim bin Uda, DPP

JUDGMENT

Mahadev Shankar J:

The appellant Mohd. Mocta bin Shariff joined the Police Force in 1976. He performed general duties in Johore Bahru until 1980 when he was transferred to Simpang Rengam where he was a member of the Police Field Force.

On 1 March 1982, he was arrested by a group of policemen at Kampong Datuk Dalam, Johore Bahru. The arresting officers gave evidence that they found in the possession of the appellant four (4) straws of a lightish brown substance which on subsequent analysis was found to contain 0.14 grammes of heroin and 0.01 grammes of morphine.

He was taken from the place of arrest to the Central Police Station at Johore where Corporal/D, Ajaib Singh made a police report. He then handed over the appellant to ASP Ali Yusof who continued with the investigations. The appellant also saw Inspector Lockman the same day but told him nothing of any significance. The following day he made a cautioned statement to Inspector Lockman.

The appellant was in remand until 30 May 1982. After his release, the appellant made a police report in which he substantially repeated what he had said in his cautioned statement. There were, however, a number of discrepancies between the two statements.

On 20 December 1982 the appellant was tried, found guilty, of an offence under s. 12(2) of the Dangerous Drugs Act 1952, Revised Act 234 of the Laws of Malaysia and sentenced under s. 12(3) of the Act to a term of imprisonment for 10 months.

Against that conviction and sentence the appellant now appeals.

The arguments against conviction presented here can be summarised as follows. It was said that the appellant had given evidence on oath, that he had not been discredited or shaken in cross-examination, that his version of what actually took place was corroborated by what he had said both in his cautioned statement and in his Police report, and that in all the circumstances he had given an explanation consistent with his own innocence which therefore entitled him to be acquitted.

It was further urged on behalf of the appellant that the learned Magistrate in rejecting the defence, had placed undue weight on the demeanour of the appellant, which the learned Magistrate had found to be thoroughly unsatisfactory.

In support of these submissions, Counsel for the appellant relied upon *Wong Chooi v. PP.* [1967] 2 MLJ 180, *PP. v. Saiman* [1971] 2 MLJ 17 and *Leow Nghee Lim v. Reg.* [1956] 2 MLJ 28.

In a nutshell the appellant's story amounted to this. Since he was a Police Officer he considered himself to be on duty 24 hours a day. He had come from Simpang Rengam to Johore Bahru on the day in question and at Jalan Trus he was given information that a suspect had drugs in his possession.

Upon receipt of this information, he apprehended the suspect, found the drugs on him and took possession thereof. But before he could do anything else the suspect escaped from his custody. He pursued the suspect to Kampong Datuk Dalam where he lost the suspect. At this point in time the Police force arrived and arrested him. At the time of his arrest, he says, the drugs he had earlier retrieved were on the ground. He told the arresting party that he was himself a Policeman but they took no notice and instead took him off to the Police Station. He has sought to urge upon this Court that since he was himself a Policeman on duty he was entitled to apprehend the suspect and had therefore every lawful authority for being in possession of drugs at the time of his arrest.

In support of his contention that he was on duty at the time Counsel for the appellant relied upon s. 19 of the Police Act 1967. Reliance was also placed on s. 23 of the Criminal Procedure Code.

The learned Magistrate found the accused wholly unworthy of any credit.

He gave a number of reasons why he chose to disbelieve the appellant. These reasons have come under attack on appeal.

I must point out that it is not enough for an accused person merely to have repeated the same story which he told in his Police report, and in his cautioned statement, on oath at the trial in order to make out a successful defence. Mere repetition however exact cannot ensure an acquittal because that will be tantamount to requiring a Court to acquit merely on the basis of the face value of the evidence given. An accused person has a greater onus than that cast upon him.

He must go further and throw a reasonable doubt on the prosecution,s evidence or else at least give a version which is equally consistent with his innocence which version has to have the required degrees of credibility.

I do not propose to repeat everything the learned Magistrate has stated in his grounds of judgment as to why he chose to disbelieve the appellant. Suffice to say that there were ample grounds why he should have rejected the appellant's story.

Out of his own mouth, the appellant in his cross examination in the Court below admitted that on the day in question he had left Simpang Rengam without the permission of his superiors. His presence in Johore Bahru was unauthorised. In no sense can he be said to have been on duty at the time. His reason for coming to Johore Bahru was riddled with discrepancies. In one instance he stated that he was coming to visit his aunt. In another he said he was coming to visit his brother. His evidence relating to the identity of the alleged informer was equally unsatisfactory. In one instance he said that the informer was a person whom he knew. At the trial, he got out of having to identify the informer by stating that he knew him only casually. There was a sharp contradiction between the prosecution evidence which was to the effect that the drugs were found in the accused's pocket whereas the

appellant's evidence was to the effect that the Police had taken them from the ground near the place where he was arrested. How the drugs allegedly came to be on the ground at Kampong Datuk Dalam was not explained. At one point he says that he had identified himself as a Police Officer to the arresting party at the time of the arrest. He goes further to state that he even knew one of the people who arrested him. But none of the prosecution witnesses confirmed this version. In his evidence he stated that he was a victim of a frame-up by the Police party. In the cross-examination of the prosecution witnesses in the Court below this serious allegation was not even put to any of the prosecution witnesses. There are a number of other features which militate against the credibility of the appellant which need not detain us here.

In the circumstances I hold that the appellant was rightly convicted in the Court below and his appeal against conviction is accordingly dismissed.

The full implications of s. 19 of the Police Act must await future determination in appropriate cases. The Court has also borne in mind the case of *PP v. Tan Hock Sing* [1963] MLJ 219 where Hashim J made some observations as to a Police Officer being deemed to be always on duty. But on the facts of this case it was quite clear that the appellant had failed to discharge the onus upon him to show that he was on duty in Johore Bahru at the material time. I hold on the facts of this case that this was an ingenious attempt by the accused to evade responsibility for the criminal conduct in which he was indulging at the time of his arrest.

In his appeal against sentence Counsel for the appellant substantially repeated what had been stated in the Court below. There was however a very important addition. Appellant's Counsel submitted that the appellant was only an addict and therefore a prison sentence should not have been imposed upon him.

Nowhere in his evidence in the Court below did the appellant give any hint that he was an addict. In mitigation this was not suggested either. For the first time on appeal appellant's Counsel was instructed to advance this line. But there was not a shred of evidence to support it. The Court offered appellant's Counsel an adjournment to produce some medical or other evidence to substantiate the contention that the appellant was an addict and it was then disclosed that no such evidence would be forthcoming.

The claim that the appellant was a drug addict has not been substantiated in the remotest degree.

It remains only to assess whether the sentence of 10 months imprisonment in the Court below was proper.

As has been observed earlier the appellant was a Police Officer with some 7 years in the service behind him when he was arrested. This Court does not agree that merely because the quantity of the drugs found on the appellant amounted to only 0.14 grammes of heroin and 0.01 grammes of morphine, no sentence of imprisonment was called for and only a fine of RM2,000 would be adequate. We would be shutting our eyes to reality if we ignore the fact that this was a case of an officer of the law who had absented himself from his place of duty to come to Johore Bahru.

The true motive for his visit was not unequivocally disclosed, and in the absence of any evidence that he was a drug addict himself, the possession in a public place of 4 straws containing heroin, and morphine, makes the real purpose of his journey to Johore Bahru very questionable indeed.

The defence advanced was an ingenious cover-up which forfeited his right to any sympathy from the Court.

In all the circumstances of this case I hold that the sentence imposed by the learned Magistrate was in fact inadequate and I therefore increase the same to 15 months' imprisonment starting today.

Also found at [1983] 2 CLJ 216